No. 18-266

In The
Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE FISHING VESSELS' RESERVE, UNITED MARINE FUND, UNITED RESERVE FUND, WEST COAST MARINE FUND, PACIFIC MARINE FUND, AND AMERICAN MARINE FUND IN SUPPORT OF PETITIONER

MICHAEL J. CUMMINS
Counsel of Record
GIBSON ROBB & LINDH LLP
201 Mission Street, Ste. 2700
San Francisco, CA 94105
(415) 348-6000
mcummins@gibsonrobb.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
INTERREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. The Preclusive Effect of the Jones Act Limits Recoverable Damages on Unseaworthiness Claims to Pecuniary Losses Only	5
II. The Lower Court Misread *Miles* and *Townsend*	8
III. The Jones Act Bars Recovery of Punitive Damages	14
IV. Awarding Punitive Damages Will Result In Significant Financial Harm, Which Could Prove Irreparable	17
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724 (1943) 9

Allen v. Simmons, 533 A.2d 541 (R.I. 1987) 17

American R.R. Co. of Puerto Rico v. Didricksen, 227 U.S. 145 (1913) 15

Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. 404 (2009) ..... *passim*

Bergen v. St. Patrick, 816 F.2d 1345 (9th Cir. 1987) 17

Guevara v. Mar. Overseas Corp., 59 F.3d 1496 (5th Cir.1995) 7, 15

Gulf, Colorado and Santa Fe Ry. Co. v. McGinnis, 228 U.S. 173 (1913) 15

Harden v. Gordon, 11 F. Cas. 480 (C.C.D. Me. 1823) 9, 14

Home Ins. Co. v. Am. Home Prod. Corp., 75 N.Y.S. 2d 196 (App. 1990) 17

Horsley v. Mobil Corp., 15 F.3d 200 (1st Cir.1994) 8, 15

Johnson & Johnson v. Aetna Cas. & Sur. Co., 285 N.J.Super. 575 (App.Div. 1995) 17

Kopczynski v. The Jacqueline, 742 F.2d 555 (9th Cir.1984) 15

Kozar v. Chesapeake & Ohio Ry. Co., 449 F.2d 1238 (6th Cir.1971) 15

TABLE OF AUTHORITIES – Continued

Page

Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944) 11, 12

McBride v. Estis Well Service, L.L.C., 768 F.3d 382 (5th Cir.2014), *cert. denied*, 135 S.Ct. 2310 (2015) 8, 15, 16

Michel v. Total Transp., Inc., 957 F.2d 186 (5th Cir.1992) 8

Michigan Cent. R.R. Co. v. Vreeland, 227 U.S. 59 (1913) 15

Miles v. Apex Marine, 498 U.S. 19 (1990) ..... *passim*

Miller v. American President Lines, Ltd., 989 F.2d 1450 (6th Cir.1993) 15

Milwaukee & St. Paul Railway v. Arms, 91 U.S. 489 (1875) 16

Mitchell v. Trawler Racer, Inc., 360 U.S. 539 (1960) 12

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 5, 6, 17

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 5, 6, 12

Omar v. Sea-Land Service, Inc., 813 F.2d 986 (9th Cir.1987) 10

Pacific Steamship Co. v. Peterson, 278 U.S. 130 (1928) 8, 10, 13, 16

Scarff v. Metcalf, 107 N.Y. 211 (1887) 12

Smith v. Trinidad Corp., 992 F.2d 996 (9th Cir.1993) 7

TABLE OF AUTHORITIES – Continued

Page

St. Louis, Iron Mtn. & Southern Ry. Co. v. Craft, 237 U.S. 648, 35 S.Ct. 704 (1915) 15

The Osceola, 189 U.S. 158 (1903) 11, 12, 13, 16

U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fl. 1983) 17

Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084 (2d Cir.1993) 15

Wildman v. Burlington N. R.R. Co., 825 F.2d 1392 (9th Cir.1987) 15

Zicherman v. Korean Airlines Co., Ltd., 516 U.S. 217 (1996) 14

STATUTES

Cal. Ins. Code § 533 (2010) 17

OTHER AUTHORITIES

Editors, Law Review (1962), "A New Look at the Unseaworthiness Doctrine: The *Roper* Case," Univ. Chicago Law Rev. Vol. 29, Issue 3 12

Francis L. Tetreault, Seamen Seaworthiness and the Rights of Harbor Workers, 39 Cornell L.Q. 381 (1954) 9, 12

Gilmore & Black, § 6-23 10

Thomas J. Schoenbaum, Admiralty and Maritime Law § 5:10 (6th ed. Oct. 2018 Update) 8

INTEREST OF AMICI CURIAE[1]

Fishing Vessels' Reserve ("FVR") was formed in 1944 by small groups of fishing vessel owners, and currently has approximately 175 members based from California to Alaska and Hawaii. The members of FVR and other amici listed below (collectively "funds") own "traditional" fishing vessels, generally smaller in size and owned by long-time fishing families.

United Marine Fund ("UMF") was formed in 1957 by small groups of fishing vessel owners, and currently has approximately 275 fishing vessel members based from California to Alaska and Hawaii.

United Reserve Fund ("URF") was formed around the same time as UMF by small groups of fishing vessel owners, and currently has approximately 125 fishing vessel members, primarily based in California.

West Coast Marine Fund ("WCMF") was formed in 1948 by small groups of fishing vessel owners, and currently has approximately 82 fishing vessel members, operating from California to Alaska.

Pacific Marine Fund ("PMF") was formed in 1973 by small groups of fishing vessel owners, and currently

---

[1] Pursuant to Rule 37.6, the following certifications are made: The undersigned counsel authored this brief in whole; no party or party's counsel made a monetary contribution intended to fund preparing or submitting this brief; and no person, other than amici curiae, made a monetary contribution intended to fund preparing or submitting this brief. All parties consented to the filing of this amici curiae brief by filing written blanket consents.

has approximately 48 fishing vessel members, operating from California to Alaska.

American Marine Fund ("AMF") was formed in 1985 by small groups of fishing vessel owners, and currently has approximately 43 fishing vessel members, operating from California to Alaska.

The funds were established as the vessel owners were having difficulty obtaining insurance coverage through normal markets, and thus the owner members believed that if membership was limited to conscientious and responsible owners like themselves, they could minimize losses and obtain coverage at reasonable costs. The funds thus provide vessel insurance coverage for its owner members and operate as unincorporated associations for the benefit of its members, not for profit.

Since formation, the purpose and goals of the funds remains unchanged – to create an association of fishing vessel owners who share responsibility for each other's losses in order to encourage safe operation of members' vessels and eliminate accidents. In furtherance of this goal, each fund carefully screens new member applicants to ensure that vessels are sound and properly maintained and operated by experienced captain and crew. The funds have been widely recognized as outstanding examples of what can be accomplished in the fishing industry through cooperative efforts, with members working together to minimize accidents and losses.

Recognition of punitive damages for an unseaworthiness claim will adversely affect the funds' fishing vessel owners. As seamen invariably plead both Jones Act negligence and unseaworthiness claims, the threat of punitive damage exposure will result in higher settlement payments, which in turn will be passed onto the vessel owners through increased insurance costs, and in some instances, could render an owner uninsurable. Further, as punitive damages are generally excluded from coverage and many states bar insurers from insuring them, it will also result in significant uninsured exposure for vessel owners.

SUMMARY OF ARGUMENT

While admiralty courts possess the ability to provide supplemental remedies (e.g. recognize a new cause of action or measure of damages) when a maritime statute addresses a claim, Congress' judgment controls. *Miles v. Apex Marine*, 498 U.S. 19, 32-33 (1990). This express limitation precludes a court, under its admiralty powers, from creating a remedy for a general maritime law claim that exceeds those remedies available under the statute. As the Jones Act limits recoverable damages for injury and death claims to pecuniary loss damages only, this same limitation applies to an unseaworthiness claim [injury and death] involving a Jones Act seamen, as *Miles* makes clear.

Because punitive damages do not involve a pecuniary loss, they cannot be recovered.

The court of appeal misread *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009) to provide for a different result. In so doing, the court failed to recognize that *Townsend* confirmed *Miles*' holding and reasoning to be correct, but avoided application of the preclusive effects of the Jones Act by finding that, unlike an unseaworthiness claim, "the Jones Act does not address maintenance and cure." 557 U.S. at 420. As a result, the Court in *Townsend* was not constrained, as it was in *Miles*, by the fundamental principle that prevents an admiralty court from going "beyond the limits of Congress' ordered system of recovery for seamen's injury and death." *Id.*

In contrast to maintenance and cure, the Jones Act addresses unseaworthiness claims, as *Miles* held and *Townsend* affirmed. The governing principles thus apply to preclude supplementation and bar recovery of punitive damages. Further, the purpose for permitting punitive damages for maintenance and cure, which remains a necessary and foundational right of seamen dating back centuries, does not apply to unseaworthiness. Allowing punitive damages for an unseaworthiness claim would also result in significant harm, especially to vessel owners, which in some cases could prove irreparable.

ARGUMENT

I. The Preclusive Effect of the Jones Act Limits Recoverable Damages on Unseaworthiness Claims to Pecuniary Losses Only

In *Miles*, the Court applied fundamental principles that guide and limit an admiralty court's ability to provide supplemental remedies under general maritime law and held that the preclusive effect of the Jones Act barred recovery of non-pecuniary damages under a unseaworthiness wrongful death claim. *See* 498 U.S. at 32-33. In so ruling, the Court thus established a "uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOSHA, the Jones Act, or general maritime law." *Id.* at 33.

In reaching this result, the Court relied heavily on *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), finding the reasoning and logic of those decisions to be controlling. 498 U.S. at 27, 31. In *Moragne*, the Court applied these principles to hold that the Jones Act did not preclude recognition of a general maritime wrongful death action claim involving a longshoreman. *See* 398 U.S. at 400-401. Conversely, in *Higginbotham*, the Court found application of these principles limited recoverable damages for a maritime law death action to those statutorily available under the Death on High Seas Act. *See* 436 U.S. at 625.

Using *Moragne* and *Higginbotham* as examples of permissible and impermissible supplementation, the

Miles Court thus reinforced how a court must apply these long-established and fundamental principles in determining whether maritime statutory remedies can be supplemented, explaining:

> Respondents argued that admiralty courts have traditionally undertaken to supplement maritime statutes. The Court's answer in *Higginbotham* is fully consistent with those principles we have derived from *Moragne*: Congress has spoken directly to the question of recoverable damages on the high seas, and "when it does speak to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the act becomes meaningless." *Moragne* involved gap filling in an area left open by the statute; supplementation was entirely appropriate. But in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries."

Miles, 498 U.S. at 31, *quoting Higginbotham*, 436 U.S. at 625.

Because the Jones Act addresses recoverable damages for death claims, the *Miles* Court held that application of these principles precluded supplementation, as it did in *Higginbotham*. In thus holding that recoverable damages for an unseaworthiness wrongful death claim could not exceed those available for a Jones Act death claim, the *Miles* Court stressed "it

would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases resulting from negligence." *Id.* at 32-33.

Miles thus makes clear that uniformity and concurrence with statutory law control and strictly limit an admiralty court's ability to provide supplemental remedies under general maritime law. While *Miles* involved a wrongful death action, application of these governing principles necessarily extend to personal injury actions. The court of appeals' erroneous suggestion that *Miles* does not apply to claims involving living seamen, *see* App. 14a, not only makes no sense and creates disuniformity, but reflects a fundamental misunderstanding of *Miles*.

Miles reinforces that limits imposed by Congress in maritime statutes control. As the Jones Act applies to personal injury and death actions, the statutory limits on recoverable damages likewise apply to all unseaworthiness claims involving seamen. Unsurprisingly, courts consistently interpret *Miles* and the governing principles to apply to personal injury actions. *See Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496, 1506 (5th Cir.1995) ("it should be clear that actions under the general maritime law for personal injury are also subject to the *Miles* uniformity principle"); *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir.1993) ("We agree . . . *Miles* has changed the law, and that wives of injured mariners may no longer sue the ship [under general maritime law] for damages for their nonpecuniary

losses"); *Horsley v. Mobil Corp.*, 15 F.3d 200, 202-203 (1st Cir.1994); *see Michel v. Total Transp., Inc.*, 957 F.2d 186, 191 (5th Cir.1992); *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 388 (5th Cir.2014), *cert. denied*, 135 S.Ct. 2310 (2015), *abrogated on other grounds by Townsend*, 557 U.S. 404 (2009).

As correctly noted by one respected commentator, "what the Court did in *Miles* is to decree that the measure of damages available to a Jones Act seaman for negligence and unseaworthiness under the general maritime law are identical in cases involving personal injury or death." Thomas J. Schoenbaum, Admiralty and Maritime Law § 5:10, p.4 (6th ed. Oct. 2018 Update) (italics omitted). Stated more accurately, *Miles* made explicit what this Court held long ago. *See Pacific Steamship Co. v. Peterson*, 278 U.S. 130, 138-139 (1928) ("whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or the negligence of the master or members of the crew . . . there is but a single legal wrongful invasion of his primary right of bodily safety . . . for which he is entitled to but one indemnity by way of compensatory damages").

II. The Lower Court Misread *Miles* and *Townsend*

In *Townsend*, the Court did not criticize or limit *Miles* holding. Instead, the Court not only found *Miles*' reasoning to be "sound" but agreed that a court could not create a supplemental remedy for a general maritime claim that exceeds the limits established by

Congress. *See* 557 U.S. at 419-420. The *Townsend* Court, though, avoided application of this principle by factually distinguishing *Miles*, noting that unlike an unseaworthiness wrongful death action, "[t]he Jones Act does not address maintenance or cure or its remedy." *Townsend*, 557 U.S. at 420-421.

For purposes of showing that Congress left to admiralty courts the job of fashioning damage and liability rules for a maintenance and cure claim, the Court pointed to the fact that maintenance and cure was "well-established before passage of the Jones Act." 557 U.S. at 420. As recognized by the Court, this right "dates back centuries as an aspect of general maritime law" and was well-established in this country when recognized by Justice Story in 1823. *Id.* at 413, *citing Harden v. Gordon*, 11 Fed.Cas. 480 (C.C.D. Me. 1823). Indeed, it traces back to the medieval sea codes, with the earliest authenticated statement of this right appearing around 1150 A.D. in the Laws of Oleron.[2] *See Harden*, 11 F. Cas. at 482-483; *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 730, fn. 6 (1943).

From ancient times to present, this foundational right remains relatively unchanged, and thus imposes an absolute obligation on the employer to pay for a seaman's medical care and wages if the seamen falls ill or becomes injured while in the service of the ship. *Townsend*, 557 U.S. at 413 (citations omitted). As

---

[2] These laws were promulgated by Eleanor, Duchess of Guinne, for Oleron, an island off of the coast of France. *See* Francis L. Tetreault, Seamen Seaworthiness and the Rights of Harbor Workers, 39 Cornell L.Q. 381, 382-83 (1954).

maintenance and cure remains a no-fault obligation, neither negligence nor causation possess any relevance to an employer's obligation to pay. *See Pacific Steamship*, 278 U.S. at 137. Further, while an implied contractual provision in a seaman's contract, it cannot be waived by contract. *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 989 (9th Cir.1987) (citations omitted).

The *Townsend* Court also stressed the distinctive nature of the claim as further evidence that the preclusive effects of the Jones Act do not apply. Unlike unseaworthiness and negligence, which are merely alternative causes of action to establish liability for the same wrong, maintenance and cure is "independent and cumulative." 557 U.S. at 423. As it is separate and apart from these other two claims, a "seaman may have maintenance and cure and also one of the other two." *Id.* at 424, *quoting* Gilmore & Black, § 6-23, at 342 (internal quotation marks omitted).

With these reasons in hand, the Court found it "possible to adhere to this traditional understanding of maritime actions and remedies without abridging or violating the Jones Act [because] this traditional understanding is not a matter to which 'Congress has spoken directly.'" *Id.* at 420-421, *quoting Miles*, 498 U.S. at 31. For purposes of supporting its holding that punitive damages were proper for penalizing the wrongful holding of this necessary and foundational right, the Court also stated that failure to provide adequate medical care served "the basis for rewarding punitive

damages in cases decided as early as the 1800's."[3] *See* 557 U.S. at 413.

In contrast to maintenance and cure, the Jones Act addresses unseaworthiness claims, as *Miles* clearly held and *Townsend* acknowledged. The governing principles thus apply to preclude supplementation and limit recoverable damages to those statutorily available for Jones Act claims. While this alone precludes an award of punitive damages, the court of appeals also failed to appreciate that the other reasons the *Townsend* Court relied on do not apply to an unseaworthiness claim.

Unlike maintenance and cure, unseaworthiness remained far from being a long-established general maritime claim when the Jones Act passed in 1920. At best, it was "an obscure and relatively little used remedy; largely because a shipowner's duty at that time was only to use due diligence to provide a seaworthy ship." *Miles*, 498 U.S. at 25 *(quote omitted)*. It continued to remain unused until transformed into a strict liability obligation by this Court in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

By way of historical background, expansion of the unseaworthiness doctrine from cargo, insurance and wage forfeiture cases into injury cases began with dictum in *The Osceola*, 189 U.S. 158 (1903). In that case, the sole question before the Court involved whether a

---

[3] In his dissenting opinion, Justice Alito noted that these cases do not resolve the question of punitive damage availability. *See* 557 U.S. at 429-31.

seaman could recover for injuries resulting from a negligent order given by the master. Prior to addressing this question, Justice Brown set forth four propositions that were allegedly "settled" in maritime law, with the second one declaring "the vessel and her owner are . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship. . . ." *Id.* at 175. As recognized by Justice Frankfurter and many commentators, this second proposition is dictum, as unseaworthiness was not before the Court. *See Mitchell v. Trawler Racer, Inc.*, 360 U.S. 539, 562 (1960) (Frankfurter, J., dissenting); Tetreault, 39 Cornell L.Q. at 391.[4]

According to one commentator, the process of turning Justice Brown's dictum into "settled" law commenced with *Mahnich*. *See* Editors, Law Review (1962), "A New Look at the Unseaworthiness Doctrine: The *Roper* Case," Univ. Chicago Law Rev. Vol. 29, Issue 3, Article 7, pg. 523. *Mahnich* changed the "shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence." *Moragne*, 398 U.S. at 399. Following *Mahnich*, this Court continued to expand the unseaworthiness doctrine in a series of cases, and it "has [now] become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act." 398 U.S. at 399.

---

[4] Further, the authority cited by Justice Brown for this proposition, *Scarff v. Metcalf*, 107 N.Y. 211 (1887), does not appear to support it. *Scarff* involved a different issue, with the court holding the owners of the ship liable for negligence of the ship's master in failing to provide adequate medical care for an ill seaman.

This judicially created maritime claim, which undeniably did not exist in the same form in 1920 as today, differs in marked contrast to the maintenance and cure claim at issue in *Townsend* which has been an established foundational right of seamen since the Middle Ages.

Further, unlike maintenance and cure, unseaworthiness does not provide cumulative or additional damages separate and apart from a Jones Act negligence claim. Instead, it merely provides an alternative cause of action to a Jones Act claim to recover the same compensatory damages for the seaman's injuries or death. *See Pacific Steamship*, 278 U.S. at 138-139.

Finally, no court has ever awarded punitive damages for an unseaworthiness claim prior to the Jones Act. While this can be explained by the fact that unseaworthiness was an obscure and little known remedy when the Jones Act passed, it can also be explained by this Court's decisions in *The Osceola* and *Pacific Steamship* which show that only compensatory damages could be recovered on an unseaworthiness claim.[8] Another reason involves the fact that the justifications for establishing the foundational right of maintenance

---

[8] The dictum in *The Osceola* provides in relevant part that a vessel and her owner are "liable to an indemnity for injuries received by seamen" resulting from unseaworthiness. 189 U.S. at 175. *Pacific Steamship* clarified that the phrase "liable to an indemnity" means "indemnity by way of compensatory damages." 278 U.S. at 138.

and cure[6] and protecting it through punitive damages do not exist with an unseaworthiness claim.

The court of appeal failed to appreciate the foregoing significant differences between unseaworthiness and maintenance and cure claims, and in so doing, did not recognize that the reasons *Townsend* relied on to permit punitive damages for a maintenance and cure claim do not apply to an unseaworthiness claim. *Miles* makes clear that the Jones Act limit on recoverable damages apply instead.

III. The Jones Act Bars Recovery of Punitive Damages

As held by *Miles* and reconfirmed by this Court, the Jones Act limits recovery to *pecuniary loss* damages. *Miles*, 498 U.S. at 32; *Zicherman v. Korean Airlines Co., Ltd.*, 516 U.S. 217, 224 (1996) (confirming *Miles'* holding that the Jones Act "permits compensation only for pecuniary loss"). The Federal Employers'

---

[6] In explaining the justifications supporting creation of this ancient right, Justice Story explained: "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour.... If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometime perish from want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of the sickness; and if liable to be so applied, the great motives for good behavior might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt." *Harden*, 11 F. Cas. at 483.

Liability Act ("FELA"), which Congress incorporated into the Jones Act, contains this same pecuniary loss damage limitation. *See Miles*, 498 U.S. at 32; *American R.R. Co. of Puerto Rico v. Didricksen*, 227 U.S. 145, 149 (1913); *Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 65, 69-71 (1913); *Gulf, Colorado and Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 175-176 (1913); *St. Louis, Iron Mtn. & Southern Ry. Co. v. Craft*, 237 U.S. 648, 656, 657 (1915).

Pecuniary loss means damages that provide compensation for an actual financial loss. *See Didricksen*, 227 U.S. at 149 (recoverable damages "limited strictly to the financial loss thus sustained"); *McGinnis*, 228 U.S. at 175-76 (stating recovery is "limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss"). As punitive damages do not provide compensation for financial loss, but instead serve to punish and deter, courts uniformly hold punitive damages cannot be recovered under the Jones Act and FELA. *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir.1984); *Horsley*, 15 F.3d 200, 203; *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir.1993); *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 389 (5th Cir.2014), *cert. denied*, 135 S.Ct. 2310 (2015); *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1240 (6th Cir.1971); *Wildman v. Burlington N. R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir.1987); *see also Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1094 (2d Cir.1993); *Guevara*, 59 F.3d at 1506

("punitive damages . . . are also rightly classified as non-pecuniary").

Further, even if considered in the absence of the preclusive effects of the Jones Act and viewed solely in the context of whether punitive damages could be recovered on a pre-Jones Act unseaworthiness claim, the result barring recovery remains unchanged. Putting aside that there are no cases awarding punitive damages, this Court has made clear that only "indemnity by way of compensatory damages" could be recovered on this claim. *See Pacific Steamship*, 278 U.S. at 138. As explained in *Milwaukee & St. Paul Railway v. Arms*, which involved injury to a passenger, a court "goes beyond the limit of indemnity" when it awards "exemplary" damages. 91 U.S. 489, 493-494 (1875). Numerous lower courts have made similar observations, and thus treat the term indemnity to preclude punitive damages. *See McBride*, 768 F.3d at 388 (citing to cases). As noted by Judge Clement in *McBride*, "taking *The Osceola* and *Pacific Steamship* Courts at their word – as contemporaneous plaintiffs did when they filed Jones Act cases rather than unseaworthiness cases – unseaworthiness defendants are [therefore] liable for an indemnity by way of compensatory damages and nothing more." 768 F.3d at 399 (Clement, J., concurring).

Presumably in an attempt to avoid the foregoing bar to recovery of punitive damages, the court of appeals stated that such damages do not constitute a pecuniary loss or non-pecuniary loss. *See* App. 14a. While not clear from the decision, the court appears to

suggest that this distinction, which is legally incorrect, somehow avoids *Miles* and permits recovery of punitive damages. Even assuming arguendo that punitive damages did not involve a non-pecuniary loss, they would still be barred, as only pecuniary loss damages can be recovered under a general maritime law claim for unseaworthiness, as *Miles* makes clear.[7]

IV. Awarding Punitive Damages Will Result In Significant Financial Harm, Which Could Prove Irreparable

Traditional commercial fishermen, like the approximate 750 vessel owners that are members of the funds, depend on protection and indemnity insurance to protect against liabilities arising from injuries to crew members. Punitive damages are generally excluded from such coverage. Further, many states, including California, New York, Florida, New Jersey and Rhode Island, preclude insurance coverage for punitive damages.[8] In those instances where no coverage exists,

---

[7] A prior Ninth Circuit panel rejected a similar argument to recover punitive damages under DOSHA; wherein, the plaintiffs claimed that punitive damages did not involve the type of non-pecuniary damages that *Higginbotham* barred. *See Bergen v. St. Patrick*, 816 F.2d 1345, 1349 (9th Cir.1987).

[8] *See* Cal. Ins. Code § 533 (2010) (California); *Home Ins. Co. v. Am. Home Prod. Corp.*, 75 N.Y.S. 2d 196, 200-201 (App. 1990) (New York); *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d 1061, 1064 (Fl. 1983) (Florida); *Johnson & Johnson v. Aetna Cas. & Sur. Co.*, 285 N.J.Super. 575, 587-89 (App.Div. 1995) (New Jersey); *Allen v. Simmons*, 533 A.2d 541, 544-545 (R.I. 1987) (Rhode Island).

the vessel owner will be left exposed to significant uninsured liability.

Further, as seamen almost invariably plead both Jones Act negligence and unseaworthiness claims, the threat of punitive exposure will force vessel owners and their insurers to pay more to settle claims than they are worth. This in turn will adversely affect the vessel owner's loss history and not only result in increased insurance costs but could render the owner uninsurable. The inability to obtain insurance would effectively put a commercial fisherman out of business and require the sale of their vessels.

While vessel owners may be able to pass on some of these increased insurance costs to purchasers of their fish catches, the majority of these costs will be borne by the owners. This in turn will affect their ability to remain in business, and could cause many to leave the industry. Further, for those cases that do not resolve and go to trial, the vessel owner could find itself liable for an uninsured punitive damage award. Given the awards handed out in the current climate, this would likely lead to financial ruin.

Small businesses, like fishing vessel owners, are the basis upon which the United States was founded. While they remain a vital and integral part of the economy, they do far more. They provide people with entrepreneurial spirits and the will to work hard an opportunity to succeed, and thus help keep alive the "American Dream." Fishing vessel owners already face significant perils and risks in performing their work,

which they have readily accepted for years without complaint. The risk of punitive damages is a risk too far, especially since it could bring an abrupt end to many family owned businesses.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

MICHAEL J. CUMMINS
Counsel of Record
GIBSON ROBB & LINDH LLP
201 Mission Street, Ste. 2700
San Francisco, CA 94105
(415) 348-6000
mcummins@gibsonrobb.com

Counsel for Amici Curiae